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No. 80-1350
IN THE

Supreme Court of the United States

October Term, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

vs.

CITY OF BOULDER, COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF OF CITY OF LOS ANGELES AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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Question Presented.

Where the state constitution grants autonomy over local matters to a home rule city, does the City Council's valid exercise of those powers to enact an Ordinance to halt cable T.V. construction within the City limits for 90 days, constitute an act of government which is beyond anti-trust attack?

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BRIEF OF CITY OF LOS ANGELES AMICUS CURIAE IN SUPPORT OF RESPONDENT.

The City of Los Angeles grants cable television franchises for various geographical areas of the City. These franchises are granted by ordinance on a non-exclusive basis after public bidding. The City, however, has not granted more than one franchise for an area. There are presently eight franchised companies operating in the City, all in different areas. The City is in the process of evaluating bids received on four other areas. The City does have a vital interest in being able to continue to exercise its legitimate governmental powers in granting cable television franchises on a competitive basis without being subject to the Sherman Act.

Summary of Argument.

The decision of the Court of Appeals correctly concluded that when a local entity is exercising governmental, as opposed to proprietary powers, it is not subject to the federal

anti-trust laws. In addition "home-rule" cities, when exercising such powers, do not need specific state authorization for the particular action.

ARGUMENT.

A City, When Acting on Governmental or Local Matters, Does Not Need Specific State Authorization to Not Be Subject to the Federal Anti-Trust Laws.

The Court of Appeals' decision should be affirmed. It recognized that when a City is exercising its governmental powers it should not be subject to the federal anti-trust laws. The majority opinion in *Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 403 (1978), made the point that when a governmental agency acts as a *provider of services*, they impact on those businesses with which they interrelate (emphasis added). A City, in granting a television cable franchise, is not acting as a provider of services, it is not casting itself in the role of a competitor of other businesses.

Even the fee that a City receives from a franchise company is fixed. Section 76.31 of 47 Code of Federal Regulations provides that franchise fees paid to the grantor of the franchise not exceed 3 percent of the franchisee's gross revenue per year. The fee can be increased up to 5 percent of such revenues if approved by the Federal Communications Commission upon a showing of reasonableness, namely, that the increase will not interfere with the effectuation of federal regulatory goals in the field of cable television and that it is appropriate in light of the planned local regulatory program.

Petitioner argues that *Lafayette* requires a State legislature to specifically authorize a "specific kind of action in a particular area" (P. Br. 35) for the local entity to be immune from federal anti-trust laws. But this would be contrary to the concept of "home rule" which is meant to allow for a certain amount of flexibility and autonomy.

The California State Constitution provides that:

> "A county or city may make and enforce within its limits all local, policy, sanitary, and other ordinances and regulations not in conflict with general laws". Article XI, Sec. 7.

The California Supreme Court has stated:

> "It is, of course, undisputed that a municipality, under Article XI, Section 11 (now 7), of the State Constitution, may, within its limits, exercise police powers equal in extent to those of the state". *McKay Jewelers, Inc. v. Bouron,* 19 Cal.2d 595, 600; 122 P.2d 543, 546 (1942).

It is certainly of concern to the City and its residents that there be control by the City of the work in public ways in the construction of a franchise system and assurance of any necessary removal of any such work, including required repair of streets, if the franchise terminates. Additionally, the city may want to assure, as does the City of Los Angeles, by the terms and conditions of the franchise, that the franchise provide adequate customer service, *e.g.*, handling of complaints.

Since a home-rule or charter city, such as Los Angeles, already has the power, equal in extent to the state pursuant to the State Constitution, to regulate matters of local concern, it would be incongruous to say that they had to get specific authorization from the State legislature to exercise those very same powers in order to be immune from federal anti-trust laws.

Though the City of Los Angeles, as a charter city, through its police powers, does have the power to franchise cable television, the State has legislated on the matter. Government Code, Section 53066, provides:

> "§ 53066. COMMUNITY ANTENNA TELEVISION SYSTEM; FRANCHISE OR LICENSE; RULES

AND REGULATIONS.

Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever."

This state statute, however, does not specify if franchises can be granted on an area basis, on a city-wide basis, whether they be exclusive or not. Adopting petitioner's argument then that even with a state pronouncement, such as this statute, on the franchising of cable television a California county or city would still be subject to federal anti-trust laws because the statute did not specifically authorize certain actions involved in granting franchises.

Conclusion.

It is respectfully submitted that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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